Supreme Court of the United States

October Term, 1950

No. 320

JOHN J. WINBERRY,

Petitioner,

vs.

W. BURTON SALISBURY,

Respondent.

REPLY BRIEF FOR PETITIONER

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Replying to respondent's brief in opposition to petition for writ of certiorari, petitioner urges:

I, II

This Court Has Jurisdiction.

Under the Act of June 25, 1948, c. 646, this Court has jurisdiction. A federal question was raised in the complaint (R. 1) and dismissal of his appeal has prevented petitioner's constitutional claim from being passed upon. Moreover, the state court of last resort necessarily passed upon denial of republican form of government, which appears in the concurring opinion below discussing violation of the constitutional scheme of governmental checks and balances and lack of any check upon the state court (R. 43-46).

It is sufficient if the federal question be raised at the earliest opportunity. *Saunders* v. *Shaw,* 244 U. S. 317, 320 (1917); *Ohio* v. *Akron Park District,* 281 U. S. 74, 79 (1930). This Court can consider questions raised at any time under the doctrine of *Hormel* v. *Helvering,* 312 U. S. 552, 556-557. We think the federal questions were raised in time to be considered here.

III

Certiorari Should Issue.

Matter of Horton (Rb11) concerns appeal from an intermediate court of appeal to the court of last resort, not an appeal from a trial court as this one. The opinion does not pass upon the point raised here, makes no holding of judicial paramountcy, and does not repeal conflicting legislation. It is not helpful on the issues of the present case.

Petitioner complains, not about *distribution* of powers, but over *loss of sovereignty* by the people of New Jersey. His quarrel is not with the rule-making power, but with

the judicial holding that the court is above the legislature and beyond the people's will on the subject of court rules of practice and procedure.

Generalized rules of law are not always satisfactory, for there are exceptions to all rules. In constitutional law generalizations are dangerous, for the past cannot always rule the present. A hard-and-fast rule of constitutional law, developed out of situations radically different from a present one, will not cover this case if 5 million people are not to lose the republic they set up less than 3 years ago.

There are cases in which the Congress alone can act, but this case is not one of them. It concerns this Court, not the federal legislature.

The present case does not concern two rival state governments, with the Congress alone capable of deciding which to recognize as the lawful government of a state and alone capable of deciding which set of senators to seat with this Court powerless to control the congressional decision, as in *Luther* v. *Borden*, 48 U. S. 1 (1849). Nor is there any necessity here for the Court to destroy one state and erect a new one, without power to influence the Congress in recognizing such new state, as in *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118 (1912). This case concerns the right of a people to be and remain sovereign by means of the ballot, a right they have lost by judicial decision in New Jersey. The controversy does not touch upon any of the congressional prerogatives, as we see it.

How could the Congress act in this case? Certainly not by refusing to seat New Jersey's senators and representatives, for the trouble does not lie in their selection. What could the President do? There is no monarchy, dictatorship, or adverse government to oust. To act at all, president and congress would have to direct recall of the decision in this case and this the political branch of the federal government has no power to do. Only this Court can order recall of a judicial decision. If the federal guaranty of a

republican form of government is to be kept this Court must keep it, for it alone possesses the power to restore their lost sovereignty to our people.

The powers assumed by the state court are novel. For the first time in the long history of the United States of America (so far as we can ascertain) a state court of last resort has asserted a power to control life, liberty and property under court-made rules adopted and *retained* without regard for the people's will. No people can be sovereign in such a situation, but must be governed in large measure by the judiciary without consent, and to such extent be denied a republican form of government. Other states may follow the example.

Decision of this case in favor of the people of New Jersey would not destroy their state, but would restore it. No new state would be created by this Court and there would be no new government for the Congress to recognize. The state and its government would continue, but the rule-making power of the judicial branch of the state government would be subordinated to the people's will as expressed by their elected legislature. That the state court will usually make and retain good rules is not the point, for the same court can make bad rules and the people can do nothing about it under the present ruling. Such an unrestrained judicial power is incompatible with a republican form of government.

The right of a court to decide cases free of the people's will is not at issue here. The court has that right. What is at issue in this case is an unlimited judicial power to make adjective law wholesale without popular check upon the use of such a novel, extraordinary power the exercise of which cuts deeply into the every-day life of a people.

This case is *sui generis*. The question posed is judicial, not political, and this Court should decide it. Neither Congress nor the President can do so.

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